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No. 94-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF CERTIORARI

Alan B. Morrison
(Counsel Of Record)
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorney for Public Citizen, Inc.

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INTEREST OF AMICUS CURIAE

This case raises the question of whether a state agency may change a regulated utility's existing rates without providing an impartial decisionmaker. Although the petitioner here is a regulated utility, the ruling below would apply with equal force (and perhaps be more likely to arise) when it is the ratepayers who are challenging the impartiality of an administrative decisionmaker.

This brief is filed, with the written consent of the parties, on behalf of Public Citizen, Inc., a non-profit public interest organization with approximately 125,000 members,

650 of whom reside in Oklahoma. Public Citizen, through the attorneys in its Litigation Group, has represented its members and consumers generally in ratemaking proceedings. All of Public Citizen's members are affected by the outcome of ratemaking proceedings. Although relatively few are directly subject to the Oklahoma court decision, all are put at risk by the precedential force of a decision which permits biased decisionmakers to participate in ratemaking proceedings. Because Public Citizen believes that the decision of the Oklahoma Supreme Court severely impairs the ability of consumers to be heard and to obtain meaningful redress in ratemaking proceedings, it supports the petition in this case.

Public Citizen submits this brief to present its somewhat different analysis of the due process issue from that which petitioner has offered. Public Citizen has long advocated the use of the three-part test in *Matthews v. Eldridge*, 424 U.S. 319 (1976), to resolve issues of what process is due in a variety of contexts. It believes that the *Matthews* analysis is applicable to the due process issues presented in this case, and that it requires reversal of the decision below.

STATEMENT OF THE CASE

In June 1987, the Oklahoma Corporation Commission's Public Utility Division ("PUD") initiated Cause No. PUD-260, to determine what modification in the telephone rates of petitioner Southwestern Bell Telephone Company would be necessary in light of the 1986 reduction in federal corporate income taxes. After some delay to allow other interested parties to intervene, four hearings took place in late January and early February 1989. The hearings were adversarial, with representatives from the State, the PUD staff, the American Association of Retired Persons ("AARP"), and Southwestern Bell participating. Each party submitted evidence, including live testimony, as well as proposed

findings of fact and conclusions of law. The hearing examiner adopted the suggestions of the PUD Staff *in toto*, including a finding that petitioner had accumulated a $30 million windfall between 1987 and October 1989 from the reduction in federal income taxes without a corresponding reduction in its rates.

During its review of that ruling, the full Corporation Commission independently examined the evidence adduced at the hearings and adopted almost all of the hearing officer's findings. In accordance with these findings, the Commission issued an order which (a) assessed an interest charge of 11.59% against petitioner's $30 million windfall, (b) mandated that the windfall be spent to upgrade corporate facilities and improve customer service, and (c) required petitioner to reduce future rates to account for the tax change.

Petitioner, the AARP, and the State appealed various portions of the Commission's order to the Oklahoma Supreme Court. In *State Ex. Rel. Henry v. Southwestern Bell*, 825 P.2d 1305 (Okl. 1991) (as modified at Denial of Rehearing on March 2, 1992) (Pet. App. 75a-102a), the court upheld key provisions of the order, including the Commission's conclusion that the $30 million windfall did not have to be refunded directly to ratepayers, but could be spent to upgrade communications service. However, the court determined that certain technical components of the Commission's ratemaking formula were not supported by substantial evidence, and remanded the order to the Commission for recalculation.

On October 2, 1992, during the remand of PUD-260, Commission Chairman Robert Anthony revealed for the first time that he had been an informant for more than four years in an investigation of corruption at the Commission. Anthony specifically alleged that an officer and several attorneys associated with petitioner had "engaged in improper activities" during the course of PUD-260, and that he had received several large bribes from these officials. Anthony

also reported that he had filed bar complaints against two of petitioner's attorneys, and that he had filed a discovery request seeking documents from petitioner to corroborate his story.

Petitioner immediately moved to recuse Chairman Anthony from further participation in PUD-260. Upon the Commission's denial of the motion without opinion, petitioner appealed to the Oklahoma Supreme Court, arguing that recusal was required by the Due Process Clauses of the Oklahoma and U.S. Constitutions.

The Oklahoma Supreme Court affirmed the denial of the recusal motion. *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, 873 P.2d 1001 (Okl. 1994) (Pet. App. 1a-59a). The court did not examine the extent of Chairman Anthony's predisposition or dispute that the conduct of Chairman Anthony gave rise to improper bias under Oklahoma law. Instead, it ruled as a matter of law:

> When Anthony and his fellow Commissioners hear PUD-260 they will act in their legislative capacity. That distinction is determinative of the issue presented for, as discussed below, proceedings which are legislative in nature do not implicate judicial processes and do not require application of the judicial standards urged by SWB. Pet. App. 6a.
>
> This recognition of the legislative nature of ratemaking proceedings and the resulting inapplicability of judicial concerns and standards, including due process notice and hearing requirements, has been repeatedly affirmed by this Court. *Id.* at 9a.

Thus, the court below held, not only under Oklahoma law, but under the Due Process Clause of the U.S. Constitution, that a particularized ratemaking proceeding is not subject to any requirement of impartiality or other due process

protection so long as the proceeding is characterized as "legislative" by the appropriate state court.

REASONS FOR GRANTING THE WRIT

The Oklahoma Supreme Court Decision is Inconsistent with this Court's Previous Pronouncements on Due Process in an Administrative Context.

While Public Citizen supports the efforts of Chairman Anthony, and, implicitly, those of the Oklahoma Supreme Court, to eliminate corruption in Commission ratemaking, that concern does not justify the ruling below. Based on that ruling, the Oklahoma Supreme Court would also dismiss a consumer complaint that a Commissioner had accepted a bribe from a regulated utility simply because, according to the Oklahoma Supreme Court, ratemaking activities are "legislative," and hence no standards of impartiality may be imposed on the process.

The Oklahoma Supreme Court's due process analysis is inconsistent with two strands of this Court's due process jurisprudence. As petitioner points out, the court below misapplied basic principles of due process from the "classic" phase of due process jurisprudence, which sharply distinguished between general and particular proceedings. *See generally Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). *Cf. United States v. Florida East Coast R. Co.*, 410 U.S. 224, 244-46 (1973). Furthermore, the court below ignored a significant body of this Court's ratemaking due process precedents, cited on page 11 of the petition, under which substantial procedural protections are mandated

by the due process clause for individual ratemaking proceedings.*

Moreover, the court below entirely failed to engage in an essential line of modern due process inquiry. The proper due process analysis for an administrative hearing is not, as the Oklahoma Supreme Court asked, whether "due process applies," but rather, "what process is due?" *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In recent years that question has been answered under the balancing test enunciated in *Matthews v. Eldridge*, 424 U.S. 319 (1976). *Matthews* has been employed in a vast array of situations beyond its original context of informal administrative adjudication. *See e.g., Connecticut v. Doehr*, 501 U.S. 1 (1991); *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *Ingraham v. Wright*, 430 U.S. 651 (1977). Hence, *Matthews* provides the proper analysis for determining the procedural requirements for the ratemaking proceeding here.

In *Matthews*, this Court required the balancing of three separate factors to determine what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an

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* In addition to the cases petitioner cited, there are several other non-Administrative Procedure Act cases which hold that individualized ratemaking warrants heightened due process consideration. *See, e.g., Railroad Com. of California v. Pacific Gas & Elec. Co.*, 302 U.S. 388 (1938); *Morgan v. United States*, 304 U.S. 1 (1937) ("Morgan II"); *St. Joseph Stock Yards Co. v. United States*, 208 U.S. 38 (1935). In contrast, the Oklahoma Supreme Court's exclusive reliance on *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908), is misguided. That case concerns the applicability of 28 U.S.C. §2283, the Anti-Injunction Act, to a ratemaking proceeding, and simply did not raise any of the due process questions at issue here.

> erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 424 U.S. at 335.

Since there is no question that petitioner has a protected property interest in the establishment of its rates and the fate of its tax windfall, the question here is whether under *Matthews* the Corporation Commission can make these ratemaking determinations where one of its members is biased against one of the parties. We consider each of the three factors in turn, and then show that the balance is overwhelmingly in favor of requiring an impartial decisionmaker.

A. *The Private Interest in Favor of Additional Protection*

Petitioner has substantial property interests at stake in ratemaking proceeding PUD-260. That proceeding will determine the disposition of the $30 million that petitioner has already collected from Oklahoma consumers, as well as the applicable interest charge assessed on petitioner's interim use of this money. Moreover, the proceeding will determine the future rates that petitioner may charge. Where property has been determined to be substantial in size, this Court has recognized that the private interest in additional process is significant. *Tulsa Collection Services v. Pope*, 485 U.S. 478, 488-89 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983).

Although the interests of individual Oklahoma consumers may not be great, collectively their interests equal that of Southwestern Bell, such that consumer interests merit distinct consideration in determining the constitutional requirements for Corporation Commission proceedings. In

this regard, we note that the Oklahoma Corporation Commission wields tremendous power over matters of concern to consumers. In addition to establishing and modifying rates for public utilities, the Commission has broad regulatory authority over all transportation, natural gas production, oil production, power company, telecommunication, and waste disposal activities occurring in Oklahoma. OK Const. Art. 9 §16. Oklahoma consumers undoubtedly have an interest in the modification of Southwestern Bell's rates generally, as well as in this particular proceeding. Thus, consumers here may receive a refund, or a different quality of service, or the prices they pay for continued service in the future may be altered. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978).

B. *Incremental Improvement in Accuracy*

The second factor is the fairness and reliability of the existing procedures, and the incremental accuracy to be gained from additional process -- here the requirement of an impartial administrative decisionmaker. The Corporation Commission's existing ratemaking procedures clearly demonstrate that the people of Oklahoma place significant importance on fair and accurate determinations in ratemaking proceedings. The following are but a few of the features of this highly judicialized process:

- The process requires 10 days notice "to all interested parties" prior to the commencement of any hearing. OK Const. Art. 9, §18; OAC §165:5-7-1. A ratemaking application must designate particular "respondents" and must state with some specificity the supporting facts, legal authority, and relief sought. OAC §165:5-7-1(d).
- The process must "afford a reasonable opportunity to present evidence and to be heard." OK Const. Art. 9 §18. The Commission's regulations allow for the

opportunity to obtain evidence through depositions (OAC §165:5-11-1(a)), document production (OAC §165:5-11-1(b)), and interrogatories (OAC §165:5-11-1(c)). Furthermore, parties may compel the attendance of witnesses through subpoenas. OAC §165:5-11-3. Evidence must be produced at trial (OAC §165:5-9-1(c)), and may be challenged through the Oklahoma Rules of Evidence (OAC §165:5-13-3(e)) and cross-examination (OAC §165:5-13-3(g)). All evidence is to be taken on the record. OAC §165:5-13-3(i).

- Judicial review of Commission orders is available as of right in the Oklahoma Supreme Court (OK Const. Art. 9, §20), and review must take place on the basis of the record made before the Commission. OK Const. Art. 9, §22. The court exercises at least "substantial evidence" review for all Commission actions, and for certain constitutional challenges the court exercises de novo review as to law and fact. *Id.* The Oklahoma Supreme Court may receive additional evidence to investigate an alleged constitutional violation. *Id.*
- On review to the Oklahoma Supreme Court, the Commission must provide a reasoned analysis for the order based on the evidence in the record. OK Const. Art. 9, §22.
- There are mandatory recusal procedures for Commissioners who have financial stakes in regulated companies. OK Const. Art. 9, §16.

The importance that Oklahoma places on fairness and accuracy during ratemaking proceedings is evident from these procedures. Indeed, the Oklahoma Constitution even recognizes that impartiality -- albeit only one type of impartiality, lack of financial interest in any party -- is essential for fair and accurate determinations during Corporation Commission proceedings. OK Const. Art. 9, §16. This narrow recusal provision produces the anomalous effect of mandating recusal for a Commissioner who receives

a bribe passed in stock certificates of a party, but not for a Commissioner who receives cash from that same party. Similarly, the provision would allow a Commissioner to sit if her spouse represented a party on a contingent fee basis, if a close relative testified as an expert witness in the proceeding, or if any number of other plausible bases for recusal were to arise. Given the nature of ratemaking proceedings in Oklahoma, assuring an impartial arbiter will advance "the prevention of unjustified or mistaken deprivations." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Many of the protections listed above implicitly assume that an impartial arbiter is responsible for operating the procedural safeguards. For example, such rudimentary participatory functions as the ability to obtain evidence through subpoenas (OAC §165:5-11-3) and other discovery (OAC §165:5-11-1(a,b,c)), to present evidence for the record (OAC §165:5-13-3(i)), and to challenge evidence through cross-examination (OAC §165:5-13-3(g)), are within the discretionary authority of the Commission, but a predisposed Commissioner cannot be expected to administer those rules fairly. Similarly, it is simply oxymoronic to expect a biased Commissioner to exercise "independent" judgment as to law and fact. *See Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, 113 S.Ct. 2264, 2277 (1993) (citing *Marshall v. Jerrico*) ("'Justice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties'"). Furthermore, the failure to provide a neutral arbiter may work to deter public participation, and thereby prevent the Commission from obtaining a full and fair picture of the range of competing interests at stake in the proceeding.

C. *The Government Interest*

The final *Matthews* factor is the increased administrative burden associated with requiring additional procedural protections. In light of the extensive protections already provided to ratemaking participants in Corporation Commission proceedings, there are several reasons to believe that the additional burden of requiring an impartial arbiter would be minimal.

The burden of requiring recusal for lack of impartiality is quite small. The Oklahoma Constitution already contains a mandatory recusal process for Commissioners with a financial interest in a regulated company. OK Const. Art. 9, §16. In accordance with this provision, the Corporation Commission must remove Commissioners with an underlying financial conflict of interest, such as ownership of stock. Any resulting vacancy may be filled by the Governor. OK Const. Art. 9, §15. For the purposes of this proceeding, the existing recusal procedure could be easily be converted to provide recusal for predisposition or other instances of partisanship.

The Oklahoma Constitution also provides the judicial structure which would be necessary to determine whether a particular type of predisposition warrants recusal. Extensive judicial review of Corporation Commission activities is available to participants in proceedings as a matter of right. OK Const. Art. 9 §20. This includes the ability to exercise independent judgment as to law and fact, and the ability to receive additional evidence when an alleged constitutional violation has occurred. OK Const. Art. 9 §22. Thus, judicial review of an allegation of impropriety could be easily accommodated within the existing Oklahoma judicial framework. Furthermore, the number of cases in which a conflict of interest would raise recusal questions is presumptively low, and certainly would not tax the abilities of the Oklahoma court or administrative system.

Although it is sometimes appropriate under this prong to consider the burden of additional procedures to interests adverse to the petitioner -- here Oklahoma consumers -- the general requirement of an impartial arbiter here does not affect the balance. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263 (1987). While in this particular case consumers might "benefit" from the failure to provide an impartial arbiter, on the whole, the ability to remove biased arbiters will work to the benefit of consumers and regulated utilities alike.

D. *On Balance, the Oklahoma Supreme Court's Decision is Incompatible with this Court's Due Process Jurisprudence*

Having reviewed all three factors, it is clear that the Oklahoma Supreme Court's decision that there was no need to provide an impartial arbiter in this proceeding is inconsistent with this Court's modern principles of due process. *See Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, 113 S.Ct. 2264, 2277-78 (1993); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Schweiker v. McClure*, 456 U.S. 188, 195-97 (1982); *Marshall v. Jerrico, Inc.* 446 U.S. 238, 242-43 (1980); *Friedman v. Rogers*, 440 U.S. 1, 17-19 (1979); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1975). Participants in Oklahoma Corporation Commission ratemaking proceedings are already entitled to significant procedural protections. The incremental burden of requiring an impartial arbiter in this situation (1) does not substantially add to the burden of the Corporation Commission because of the existence of mandatory recusal provisions for Commissioners with financial interests in regulated companies, and (2) will substantially enhance the accuracy and fairness of the ratemaking proceeding, since many of the procedural protections are implicitly unfair if the decision-maker is partial. The Oklahoma Supreme Court's resolution of the problem unacceptably impairs the ability of

consumers to participate in unbiased tribunals and to obtain redress for allegations of impropriety, in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

Alan B. Morrison*
Public Citizen Litigation Group
Room 700, 2000 P Street NW
Washington, D.C. 20036
(202) 833-3000

Attorney for *Amicus Curiae*
Public Citizen, Inc.

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